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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HAROLD ANTHONY VELARDE,  
CDCR #K-43056,

Plaintiff,

vs.

E. DUARTE, Correctional Officer,

Defendant.

Civil No. 11cv0287 BEN (CAB)

**ORDER:**

(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED *IN*  
*FORMA PAUPERIS*, IMPOSING  
INITIAL PARTIAL FILING FEE  
AND GARNISHING BALANCE  
FROM PRISONER'S TRUST  
ACCOUNT PURSUANT  
TO 28 U.S.C. § 1915(a)  
[Doc. No. 2];

(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL  
[Doc. No. 3]; and

(3) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF COMPLAINT  
PURSUANT TO FED.R.CIV.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)

Harold Anthony Velarde ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for Appointment of Counsel [Doc. No. 3].

## I.

## MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has submitted a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. Plaintiff's statement shows a current available balance of \$150.27, an average monthly balance of \$742.68, and average monthly deposits totaling \$154.06. Based on this financial information, the Court GRANTS Plaintiff's Motion to Proceed IFP [Doc. No. 2] and assesses an initial partial filing fee of \$148.54 pursuant to 28 U.S.C. § 1915(b)(1).

However, the Secretary of the CDCR, or his designee, shall collect this initial fee *only if sufficient funds in Plaintiff's account are available at the time this Order is executed* pursuant to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available to him when payment is ordered.”). The remaining balance shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## II.

**MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3]**

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept of Soc. Servs.*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff's request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

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1 III.

2 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

3 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
4 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
5 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
6 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
7 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
8 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,  
9 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
10 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
11 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)  
12 (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
13 § 1915A).

14 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
15 allegations of material fact and must construe those facts in the light most favorable to the  
16 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
17 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
18 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,  
19 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
20 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a  
21 pro se civil rights complaint, the court may not “supply essential elements of claims that were  
22 not initially pled.” *Ivey v. Bd of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.  
23 1982). “Vague and conclusory allegations of official participation in civil rights violations are  
24 not sufficient to withstand a motion to dismiss.” *Id.*

25 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua  
26 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). See *Lopez*, 203 F.3d at  
27 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf.  
28 See 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform

all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

#### IV.

#### CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion for Appointment of Counsel [Doc. No. 3] is **DENIED** without prejudice.

2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is **GRANTED**.

3. The Secretary of the CDCR, or his designee, is ordered to collect the \$148.54 initial partial filing fee assessed by this Order and forward that amount to the Clerk of Court, *if those funds are available at the time this Order is executed*. THE INITIAL PARTIAL FILING FEE SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

4. The Secretary of the CDCR, or his designee, is ordered to collect from Plaintiff’s prison trust account the balance of the \$350 filing fee owed in this case by collecting monthly payments from Plaintiff’s prison trust account in an amount equal to twenty percent (20%) of the preceding month’s income credited to the account and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL MONTHLY PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THAT NAME AND NUMBER ASSIGNED TO THIS ACTION.

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1           5.       The Clerk of the Court is directed to serve a copy of this order on Matthew Cate,  
2 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,  
3 Sacramento, California 94283-0001.

4           **IT IS FURTHER ORDERED** that:

5           6.       The Clerk shall issue a summons as to Plaintiff's Complaint [Doc. No. 1] upon  
6 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
7 Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and  
8 a certified copy of his Complaint and the summons so that he may serve Defendants. Upon  
9 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and  
10 accurately as possible, and to return them to the United States Marshal according to the  
11 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,  
12 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed  
13 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.  
14 *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3).

15           7.       Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the  
16 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42  
17 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to  
18 reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility  
19 under section 1983," once the Court has conducted its sua sponte screening pursuant to 28  
20 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on  
21 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the  
22 merits," the defendant is required to respond).

23           8.       Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
24 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
25 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
26 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
27 of any document was served on Defendants, or counsel for Defendants, and the date of service.

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1 Any paper received by the Court which has not been filed with the Clerk or which fails  
2 to include a Certificate of Service will be disregarded.

3 **IT IS SO ORDERED.**

4 DATED: 2-15-2011

  
HON. ROGER T. BENITEZ

United States District Judge